

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 18, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP2504-FT

Cir. Ct. No. 2014TR5434

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WALWORTH,

PLAINTIFF-RESPONDENT,

V.

JAMES E. ROBINSON, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ James E. Robinson, Jr. appeals from a circuit court judgment convicting him of operating a motor vehicle while intoxicated, first

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

offense. He argues the evidence presented at his court trial was insufficient to support a finding of guilt. We disagree and affirm.

Background

¶2 The relevant evidence from Robinson’s trial is as follows.

¶3 Craig Tripp testified that around 10:45 a.m. on December 7, 2014, he was driving on Interstate 43 when he noticed a pickup truck in front of him being operated “erratical[ly].” Following the truck for approximately twenty to twenty-five miles, Tripp observed the driver “slumping over the steering wheel,” as if he had a medical condition or was perhaps falling asleep, and “going from lane to lane,” “[t]aking up more than both lanes,” “running over the far left hand line,” and “running speeds over 70 miles an hour and then slowing down to 40 miles an hour.” Tripp called the police and maintained contact with the truck until law enforcement officers could intervene.

¶4 Walworth County Sheriff’s Department Sergeant Mark Roun testified he had been in law enforcement for twenty-one years. He had been notified of a vehicle “taking up several lanes of traffic ... weaving, speeding up, slowing down.” When the vehicle passed by Roun’s stationed location on I-43, the driver “was kind of hunched over” and appeared to be falling asleep or tired. Roun began conducting a traffic stop on the vehicle, activating his emergency lights, but it took the operator an “extended period of time” to stop. Roun and Walworth County Sheriff’s Department Sergeant Timothy Otterbacher, who was also on I-43 but in a separate vehicle from Roun, had to also activate their sirens to get Robinson to stop.

¶5 Roun procured the driver's license of the operator of the vehicle and identified the operator as Robinson.² He observed Robinson to be "slow and deliberate" with his actions in the vehicle and noticed the "same like slow, deliberate, unsteady kind of demeanor" when Robinson stepped out of the vehicle. When Otterbacher performed field sobriety tests on Robinson, Roun "had to stand on the white line ... as [Robinson] was doing the heel to toe and the one leg stand [tests] because he was so unsteady and I didn't want him to fall into traffic." Roun was only able to observe portions of the field sobriety tests conducted by Otterbacher but his opinion was "there was a safety concern ... with this driver."

¶6 Otterbacher testified he had been in law enforcement for over thirty years. While on I-43, he also observed Robinson "hunched way over his steering wheel" as if he was sleeping. Otterbacher participated in the traffic stop on Robinson. When he made contact with Robinson, Robinson "appeared out of it." Robinson "did not look right, did not answer questions appropriately [and] did not walk right when he got out of his vehicle.... His answers were vague, very slow, slower than a normal person. And ... I felt that something was amiss."

¶7 Otterbacher testified that when he asked Robinson "to explain his driving behavior," Robinson responded that he "had a psychologic or psychiatric history and that he is on ... numerous medicines," and he told Otterbacher "some of what they were." The medications were later "spelled out" for Otterbacher as Doxepin, Klonopin, Trazodone and "a generic version of Seroquel." Robinson told Otterbacher his last dose was "9:30 to 10 o'clock p.m. last night."

² On appeal, Robinson does not dispute he was the operator of the vehicle observed by Tripp and stopped by law enforcement.

Otterbacher had Robinson perform various field sobriety tests, beginning with the Horizontal Gaze Nystagmus (HGN) test. Otterbacher first directed Robinson to touch the tip of the pen Otterbacher was using for this test. Otterbacher confirmed Robinson performed in a manner that was “out of the ordinary”:

When he came up to touch the pen, he totally missed the top of the pen and he was an inch or two closer to my face than to the tip of the pen and what struck me as odd is he kind of maintained that position for five seconds or so. It was an unusually longer length of time. It's like he was almost thinking that he was touching the pen. But then he moved his finger back and did touch the tip of the pen.

Otterbacher ultimately observed Robinson to exhibit all six signs of impairment on the HGN test. Otterbacher testified that in addition to alcohol, certain drugs could impair a person and also cause nystagmus.

¶8 Otterbacher then had Robinson perform the walk-and-turn test and observed Robinson was “off balance,” “not able to walk in a heel to toe fashion except for about two steps and his turn was off.” Otterbacher considered Robinson to have failed this test. For the next test, the one-leg stand test, Otterbacher instructed Robinson to “stand with his arms at his sides and to simply lift one leg off the ground by about six inches.” Robinson “lifted up his leg for a brief period of time, put it back down and continued to count. He lifted his leg up again and got to approximately the number 10 and then placed his foot back on the ground.” Robinson also “continually raised his arms at the start of the test and then during that second test up to 10 when he lifted his foot back up the second time.” Based upon the various “clues” he observed, Otterbacher considered Robinson to have failed this test as well. Otterbacher then administered the alphabet test, which Robinson performed successfully. A preliminary breath test of Robinson showed no alcohol.

¶9 Otterbacher placed Robinson under arrest, concluding he was “impaired and shouldn’t be driving and that ... he was under the influence of something.” Otterbacher confirmed that when officers searched Robinson’s vehicle, they did not bring to Otterbacher’s attention any “beer cans, pill bottles, or anything like that.” Otterbacher took Robinson to a medical center for a chemical test, but Robinson refused to allow Otterbacher to procure a blood sample, stating he “would rather take his own blood test.” Otterbacher asked for Deputy Garth Frami, a drug recognition expert (DRE) with the Walworth County Sheriff’s Department, “to come in,” but cited Robinson for “operating while under the influence” even before Frami arrived. Otterbacher confirmed on cross-examination that Robinson had indicated to him that he was “tired, very tired.” When asked if that was consistent with what he had observed earlier, Otterbacher responded, “[w]ell, I thought it was a lot more than being tired” but “there are some consistencies, yes.” Otterbacher confirmed Robinson had been “nodding off,” adding “[m]ost people would not do that when they are under arrest.” On the Alcoholic Influence Report, Otterbacher indicated Robinson had told him on the day of the arrest that he had slept from “10:00 to 1:00” and then again from “2:30 till 4:00,” but Otterbacher also wrote on the report “five to six hours.” Also on that report, Otterbacher indicated Robinson had told him he “did not abuse any prescriptions and ... did not take any illegal narcotics on today’s date.”

¶10 Frami testified to his training in the DRE program, adding that he is an instructor in standardized field sobriety testing and is “called in off duty or on duty,” including by other departments, when there is suspicion a person under arrest is potentially impaired by drugs. As a DRE, he had administered the drug recognition evaluation approximately forty-eight times.

¶11 Frami spent about an hour with Robinson at the medical center, during which time Robinson told Frami he had had “inadequate” sleep, “five or six hours.” Upon first making contact with Robinson, Frami immediately observed him to be “on the nod,” which Frami stated is “usually associated with narcotic analgesics.” He explained that “on the nod” is slightly different from sleeping:

The subject on the nod ... will just slowly drift their head down while they're closing their eyes as if they were going to sleep.... However, generally if a person's falling asleep, they generally jerk their head back awake when they catch themselves falling asleep. A person on the nod doesn't do this, they are usually conscious and alert of what's going on and what's around them. So also when you ask them questions, they are able to respond and don't have to wake up and say what was that, I wasn't paying attention or that way.

Frami also observed that Robinson “was disorientated [sic]. Seemed confused. Was slow to react. Had slow, coarse, raspy speech.” Robinson did, however, provide answers to Frami’s questions and Frami understood what Robinson told him. When asked, Robinson told Frami he had taken “several” central nervous system depressants “the night before,” specifically the prescription medications Seroquel, Doxepin and Trazodone.

¶12 Frami administered the drug recognition evaluation on Robinson, beginning with a test during which Robinson stood with his feet together, hands down at his sides, and then closed his eyes, tilted his head back slightly and estimated the passage of thirty seconds. On this test, Robinson “stopped the test early at 26 seconds” and was also “swinging approximately two inches front and back and one inch side to side.” Robinson next performed the walk-and-turn test. Frami observed five out of eight possible clues of impairment, specifically that Robinson was “[u]nable to maintain the instructional position. Started the test too soon. Wrong number of steps. Raised his arms during the test and stepped off the

line.” On the one-leg stand test, Robinson exhibited all four clues of impairment with the left foot and then three out of four clues with the right foot. The clues of impairment for this test are: “Puts foot down during the test. Sways while balancing more than two inches. Raises arms more than six inches and hops during the test.” On the finger-to-nose test, where a subject stands with head tilted back slightly and eyes closed, and touches a finger to his or her nose upon command, Robinson displayed “no validated clues, ... but there was [sic] several signs of impairment. He opened his eyes during the test. Hesitated during commands. Used the pad inside of his finger to touch his nose” instead of the tip of his finger. Frami also attempted to administer to Robinson the HGN test, which “can get positive test results from central nervous system depressants, inhalants and associate anesthetics,” but Robinson was unable to keep his head up, his eyes open, or follow Frami’s finger with his eyes long enough for Frami to validate if any clues were present.

¶13 Frami determined Robinson was “not able to operate a vehicle safely at all,” and was under the influence of a “narcotic analgesic.” He acknowledged this latter determination was inconsistent with Robinson’s statements that he was on central nervous system depressants, “but evaluation again without the [HGN] test, that could change the opinion or add to it ... but appeared that he was under the influence of narcotic analgesic.” Frami also testified “[c]entral nervous system depressants and narcotic analgesics are very close and in comparison to the signs and symptoms they exhibit.” He further stated some of the results he obtained in his evaluation of Robinson could have occurred as a result of using central nervous system depressants, adding:

Again, on the nod would not be associated with that category and that’s different than someone falling asleep. So, based on that, the other evidence, there could also be

poly drug use in this case which would mean he was under the influence of multiple drug categories which would equate for some of the other signs and symptoms I saw as well. Drugs don't always affect everybody the same. You got your happy drunks and your angry drunks. Drugs work the same way. So there could be something else that was adding to this as well.

¶14 Robinson also testified. He stated he did not take any “medications,” “controlled substances,” “pain killers,” or alcohol in the morning of December 7, 2014. He testified he went to bed “around midnight” the night before his arrest and was tired while driving on I-43 that morning but “was not on a nod from any opiates ... at all,” adding, “[y]ou didn't find any in my vehicle.” He acknowledged informing Otterbacher of the various medications he was taking, and confirmed Otterbacher's testimony as to the medications he was taking was “accurate.” Robinson testified he last took the medications around 9 p.m. the evening before his arrest, confirmed he “then went to bed,” and further stated he takes the medications in the evening because they “can make you tired.” Robinson confirmed he did not believe he was under the influence “of anything other than being tired” while driving that day. He added he has “a slouch” from when he was younger, “so I guess it might appear that I'm hunched over just from that bad posture.” Robinson's counsel asked him, “[y]ou speak kind of slow now, is that the way you normally speak,” to which Robinson responded, “Yeah.”

¶15 Based upon the testimony presented, the trial court concluded Robinson was “impaired by the medicines he took, whatever—how he took them and when he took them or I don't know,” adding Robinson “[d]idn't have that bad a night of sleep actually if he had six hours. I don't see anything unusual about that.” The court found Robinson guilty, concluding the medicines “affected his driving to the point of clear, satisfactory, and convincing evidence that he was impaired and not safe to drive.” Robinson appeals.

Discussion

¶16 In considering the sufficiency of the evidence, if “the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met,” we will sustain the verdict. *See City of Milwaukee v. Wilson*, 96 Wis. 2d 11, 21, 291 N.W.2d 452 (1980). In the case now before us, the County was required to prove this first-offense violation of WIS. STAT. § 346.63(1)(a) with evidence that was clear, satisfactory and convincing. *See* WIS. STAT. § 345.45.

¶17 On appeal, we will not upset a trial court’s findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Further,

the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact’s verdict must be the one followed on review unless the evidence is incredible as a matter of law. It is exclusively within the trier of fact’s province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence.

State v. Below, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95 (citations omitted). Whether the evidence presented at trial ultimately is sufficient to support the conviction is a question of law we review de novo. *State v. Booker*, 2006 WI 79, ¶12, 292 Wis. 2d 43, 717 N.W.2d 676.

¶18 WISCONSIN STAT. § 346.63 provides in relevant part:

(1) No person may drive or operate a motor vehicle while:

(a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any

other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving.

Here, the County needed to prove Robinson drove his motor vehicle on a highway, a fact not in dispute, and at that time was under the influence of a drug to a degree which rendered him incapable of safely driving. The County proved this.

¶19 The trial court found all of the County's witnesses credible and ultimately did not believe Robinson's testimony that his impairment at the time he was driving on I-43 was due only to a lack of sleep. It was undisputed Robinson took multiple prescription medications at some point in time prior to driving. The court found that regardless of when or how Robinson took the drugs, they rendered him incapable of safely driving. We agree.

¶20 Independent witness Tripp observed Robinson's erratic driving—"going from lane to lane," "[t]aking up more than both lanes," "running over the far left hand line," and "running speeds over 70 miles an hour and then slowing down to 40 miles an hour"—over a period of twenty to twenty-five miles. Tripp, as well as Roun and Otterbacher, noticed Robinson slumped or hunched over the steering wheel, and Roun and Otterbacher had to activate their sirens, in addition to emergency lights, in order to get him to stop. Roun observed Robinson to display a "slow, deliberate, unsteady kind of demeanor," and had to stand near Robinson as he performed field sobriety tests to ensure he did not fall into traffic. Roun concluded Robinson posed "a safety concern."

¶21 When Otterbacher interacted with Robinson, Robinson appeared "out of it" and "did not look right, did not answer questions appropriately ... did not walk right when he got out of the vehicle. His answers were vague, very slow,

slower than a normal person.” Robinson also displayed numerous indicia of impairment during the performance of field sobriety tests with Otterbacher. During the traffic stop, Otterbacher asked Robinson “to explain his driving behavior,” and Robinson responded that he “had a psychologic or psychiatric history and that he is on ... numerous medicines” and told Otterbacher what some of them were. This response by Robinson to Otterbacher’s request for him to explain his driving behavior indicates Robinson’s awareness at the time that these drugs were impairing him. This conclusion is also supported by Robinson’s refusal to provide a blood sample when requested—an indication Robinson knew incriminating evidence was likely to be found in his blood. *See State v. Bettinger*, 100 Wis. 2d 691, 698, 303 N.W.2d 585, *modified*, 100 Wis. 2d 691, 305 N.W.2d 57 (1981). Otterbacher concluded Robinson was “impaired and shouldn’t be driving and that ... he was under the influence of something.” He thought Robinson’s condition was the result of “a lot more than being tired.” He cited Robinson for operating while under the influence and asked for a drug recognition expert to meet him at the medical center.

¶22 Frami’s testimony provided more evidence of Robinson’s drug impairment. While Robinson makes much of the fact Frami had concluded Robinson was under the influence of a “narcotic analgesic” rather than the “central nervous system depressants” Robinson admitted previously taking, Frami acknowledged his opinion may have been different if he had been able to perform the HGN test on Robinson—a test he was not able to perform because Robinson was unable to keep his head up or eyes open or follow Frami’s finger with his eyes long enough. Frami also testified that “[c]entral nervous system depressants and narcotic analgesics are very close and in comparison to the signs and symptoms they exhibit.” What is key from Frami’s testimony is his certainty that Robinson

was under the influence of some type of drug or drugs which made him incapable of safely operating a vehicle.

¶23 Robinson testified to the various prescription drugs he had taken. While Robinson told Otterbacher and testified at trial he had taken his last dose of his medications two to three hours before midnight, the trial court indicated it did not know “how” or “when” he took the medications, but was convinced the drugs, not a lack of sleep, were the cause of Robinson’s impairment. Robinson argues he was just tired when he was driving on the morning of December 7, 2014; but in light of the significant abundance of testimony as to his impairment, the court certainly could reasonably believe the medications he admitted taking were impairing him to a degree which rendered him incapable of safely operating his vehicle.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

